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FILED
AUG 31 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955.

No. 368

WALTER S. FARLEY,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1955.

No.

WALTER S. FARLEY,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

Walter S. Farley prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on April 3, 1956.

OPINION BELOW.

The opinion of the United States Court of Claims (App. p. 8) is reported in 139 F. S. 757.

JURISDICTION.

The judgment of the United States Court of Claims was entered April 3, 1956 (Tr. p. 53). A timely motion for rehearing was denied June 5, 1956 (Tr. p. 54). The jurisdiction of the Court is invoked under 28 U. S. C. §1255(1).

QUESTIONS PRESENTED.

Whether a United States Marshal is an executive officer whose duties are ministerial and purely executive.

Whether Congress by 28 U. S. C. §541(c) has declared that the President may only remove a Marshal after the expiration of his term and before his successor is appointed and qualifies.

STATUTE INVOLVED.

Act of June 25, 1948, 62 Stat. 911, 28 U. S. C. §541(c):

> "Each Marshal shall be appointed for a term of four years, except in the District of Hawaii where the term shall be six years. Upon the expiration of his term a Marshal shall continue to perform the duties of his office until his successor is appointed and qualifies, unless sooner removed by the President."

STATEMENT.

Plaintiff was appointed Marshal of the United States in and for the Eastern District of Pennsylvania by the President of the United States by and with the advice and consent of the Senate on April 8, 1952 for a term of four years. His salary was $8,360 per annum.

On June 29, 1954 the President in writing notified plaintiff of his removal effective upon the appointment and qualification of his successor. One William O'Brien upon nomination by the President and confirmation by the Senate took office on August 1, 1954. On August 2, 1954 plaintiff filed this action challenging the legality of his removal and claiming salary for the balance of his term viz. from August 1, 1954 to April 7, 1956, or the sum of $14,102.80.

On April 3, 1956 the United States Court of Claims dismissed the petition upon the grounds that the Act of June 25, 1948, 62 Stat. 911, 28 U. S. C. §541(c) does not state that a marshal cannot be removed by the President before the expiration of his four-year term; that the President can remove an executive officer before the expiration of the statutory term of office; that a United States marshal is an executive officer whose duties are ministerial and purely executive, and therefore he can be removed at the pleasure of the President prior to the expiration of the statutory term of office (Tr. p. 51).

Petitioner filed timely motion for rehearing upon the ground that the Court has declared in *Cammer v. United States*, 350 U. S. 399, 405, that marshals are in the same category as bailiffs, court clerks and judges and to be conventional court officers; that in its interpretation of the statute involved, the United States Court of Claims had ignored and violated principles of construction established by the Court's decisions (Tr. p. 54). Such motion for rehearing was overruled June 5, 1956 (Tr. p. 54).

REASONS FOR GRANTING WRIT.

Whether a United States Marshal is a purely executive officer whose duties are ministerial and purely executive and who may be removed by the President before his term expires, is an important question of Federal law which should be decided by the Court.

1. The Court below decided that a United States Marshal is an executive officer whose duties are ministerial and purely executive.

In *Cammer v. United States*, supra, p. 405, the Court declared there to be a single category composed of

> "marshals, bailiffs, court clerks or judges."

and within

> "the group of persons who serve as conventional court officers and are regularly treated as such in the laws. See 28 U. S. C. §§601-963."

Within 28 U. S. C. §§601-963, United States Marshals are referred to in §604(8) relating to the disbursement by the Director of the Administrative office of the United States Courts of moneys appropriated for the maintenance and operation of the courts; in §713(d) relating to the preservation of order and the performance of such other necessary duties as the court or judge may direct; and in §755 relating to attending the court, maintaining order, waiting upon the grand and petit juries and performing such other necessary duties as the judge may direct.

The Rules of the Courts of Appeals refer to the United States Marshal as a court officer (1st Cir., Rule 6; 3d Cir., Rule 7; 4th Cir., Rule 5; 5th Cir., Rule 6; 6th Cir., Rule 6; 7th Cir., Rule 5; 8th Cir., Rule 3(d); 10th Cir., Rule 6).

Under 28 U. S. C. §1866(a) "the court may require the

United States marshal to summon a sufficient number of talesmen from the by-standers" and this occurred on June 1, 1955 in Foley Square, New York City, under the order of Judge Edward J. Dimock of the United States District Court for the Southern District of New York. Under 28 U. S. C. §1866(b) it is the United States marshal who returns a special jury ordered by a district court. The marshal serves summonses for jury service under 28 U. S. C. §1867.

In the event of a vacancy the District Court under 28 U. S. C. §545 may appoint a United States marshal to serve until the vacancy is filled. Under §547 the United States marshal is the marshal of the District Court and of the Court of Appeals and of the Customs Court, as set forth, and is required to execute all lawful writs, processes and orders issued under authority of the United States; under §548 the marshal administers oaths to persons presenting claims and accounts for payment; and under §549 exercises the same powers which a sheriff of the state may exercise in executing the state laws. He is forbidden by §556 from practicing law in any United States court.

In view of his functions and duties, whether a marshal is a purely executive officer is an important question of Federal law which should be decided by the Court.

2. In *Humphrey's Executor v. United States*, 295 U. S. 602, the Court said, p. 631:

> "The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office; the *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; * * *
>
> "To the extent that, between the decision in the *Myers* case, which sustains the unrestrictable power

> of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise."

By the Act of June 30, 1926, 44 Stat., 916, 28 U. S. C. §491 (1940 ed.), it was provided, in pertinent part:

> "Marshals * * * shall be appointed and commissioned for a term of four years and shall continue to discharge the duties of their * * * offices unless sooner removed by the President, until their successors shall be appointed and qualify in their stead."

That was the former statute. The present statute, under which petitioner was appointed, is the Act of June 25, 1948, 62 Stat. 911, 28 U. S. C. §541(c) which provides, in pertinent part:

> "Each Marshal shall be appointed for a term of four years * * * Upon the expiration of his term a Marshal shall continue to perform the duties of his office until his successor is appointed and qualified unless sooner removed by the President."

By this statute, Congress has provided that the power of the President to remove does not arise until the marshal's term has expired. This is as effective a limitation as if causes for removal were specified. It makes the four year term definite and certain subject only to the impeachment power of the Congress. With such purpose so clearly expressed there should be no judicial disagreement.

This interpretation arises from comparison of the 1926 and 1948 statutes (*White v. United States*, 305 U. S. 281, 287, 288), and is confirmed in that the 1948 statute by enumerating the condition upon which the power of re-

moval may be exercised, prohibits the removal otherwise (*Gegiow v. Uhl*, 239 U. S. 3, 9). Lack of "legislative history" matters not (*Trailmobile Co. v. Whirls*, 331 U. S. 40, 61).

Whether Congress has limited the power of the President to remove a United States Marshal is an important question of Federal law which should be decided by the Court.

CONCLUSION.

The issue raised by petitioner is an important question of Federal law which should be decided by the Court.

Respectfully submitted,

EDWIN J. McDERMOTT,
Counsel for Petitioner.

APPENDIX.

OPINION BELOW.

IN THE
UNITED STATES COURT OF CLAIMS.

No. 314-54.

(Decided April 3, 1956.)

WALTER S. FARLEY
VS.
THE UNITED STATES.

MR. EDWIN J. McDERMOTT for plaintiff;
MR. PHILIP W. LOWRY, with whom was MR. ASSISTANT ATTORNEY GENERAL WARREN E. BURGER, for defendant.

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT.

LITTLETON, Judge, delivered the opinion of the court:

The plaintiff sues for $14,102.80, representing salary for the period August 1, 1954, to April 7, 1956. The President,

by and with the advice and consent of the Senate, appointed plaintiff to the office of United States marshal, Eastern District of Pennsylvania, on April 8, 1952, for a term of four years, commencing on the same day. The President notified plaintiff by letter of June 29, 1954, that he was thereby removed from the office of United States marshal, effective upon the appointment and qualification of his successor. A successor was appointed by the President and took office on August 1, 1954. Both parties have moved for summary judgment.

The plaintiff contends that the office of United States marshal is a part of the judicial system and not a part of the executive department, and that Congress could and did limit the power of the President to remove a United States marshal to the period commencing after the term of four years had expired and before a successor had been appointed. The defendant contends that a United States marshal performs no judicial function and that his duties are wholly of an executive nature, and that the Congress could not and did not restrict the President's power of removal of a marshal.

The statute upon which plaintiff relies, Act of June 25, 1948, 62 Stat. 911, 28 U. S. C. §541 (c), provides:

> Each marshal shall be appointed for a term of four years, except in the district of Hawaii where the term shall be six years. Upon expiration of his term a marshal shall continue to perform the duties of his office until his successor is appointed and qualifies, unless sooner removed by the President.

The plaintiff interprets this provision to mean that the President cannot remove a marshal until after the four-year term has expired. Such an interpretation is neither supported by the words of the statute nor its legislative history. There is nothing in section 541 (c) that states that a marshal cannot be removed by the President before the expiration of his four-year term. There is nothing in the legislative

history that indicates that Congress intended to impose any restriction or limitation on the power of the President to remove a marshal.

It is settled that the President can remove an executive officer before the expiration of the statutory term of office. See *Parsons v. United States*, 167 U. S. 324, where the Court held that a district attorney of the United States could be removed by the President before the expiration of his four-year term.

To adopt plaintiff's interpretation would mean that a marshal could only be removed during the four-year term by the process of impeachment by the House of Representatives and a conviction thereon and removal by the Senate as punishment. This could not have been the intention of Congress.

We believe that it is clear that a United States marshal is an executive officer whose duties are ministerial and purely executive, and therefore he can be removed at the pleasure of the President prior to the expiration of the statutory term of office. *Myers v. United States*, 272 U. S. 52; *Humphrey's Executor v. United States*, 295 U. S. 602; *Morgan v. Tennessee Valley Authority, et al.*, 115 F. 2d 990, cert. den. 312 U. S. 701.

Defendant's motion for summary judgment is granted, the plaintiff's motion for summary judgment is denied and his petition is dismissed.

It is so ordered.

LARAMORE, Judge; MADDEN, Judge; WHITAKER, Judge; and JONES, Chief Judge, concur.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 368

WALTER S. FARLEY

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims dismissing the petition (Pet. 8-10) is reported at 139 F. Supp. 757.

JURISDICTION

The judgment of the Court of Claims was entered on April 3, 1956 (R. 50). A motion for rehearing, seasonably filed, was denied on June 5, 1956 (R. 54). The petition for a writ of certiorari was filed August 31, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1255(1).

QUESTION PRESENTED

Whether the President may remove a United States Marshal prior to the expiration of his appointive term of office.

STATUTE INVOLVED

28 U. S. C. 541, in pertinent part, provides:

> (a) The President shall appoint, by and with the advice and consent of the Senate, a United States marshal for each judicial district.
>
> * * * * *
>
> (c) Each marshal shall be appointed for a term of four years * * *. Upon the expiration of his term a marshal shall continue to perform the duties of his office until his successor is appointed and qualifies, unless sooner removed by the President.

STATEMENT

After nomination by the President and confirmation by the Senate, the President issued a commission appointing petitioner, Walter S. Farley, United States Marshal for the Eastern District of Pennsylvania for a term of four years subject to the conditions prescribed by law (R. 1, 2, 5). On April 16, 1952, petitioner took his oath and otherwise qualified as United States Marshal including the execution of a certificate that as an "officer or employee in the *executive branch* of the Federal Government" he "shall not take any part in political management or * * * campaigns" (emphasis added) (R. 1, 2, 5, 14, 15). On April 23, 1952, petitioner entered into and continued the duties of his office until June 29, 1954, when the President notified him in writing that he was "removed from the office of United

States Marshal, Eastern District of Pennsylvania, effective upon the appointment and qualification of your successor" (R. 2, 15). On the same day, William A. O'Brien was nominated to the office of United States Marshal for the Eastern District of Pennsylvania and after Senatorial confirmation (100 Cong. Rec. 10520) entered into that office on August 1, 1954 (R. 2, 5). On August 2, 1954, Farley filed a petition in the Court of Claims challenging the legality of his removal and seeking $14,102.80, the amount of his salary for the unexpired portion of his term (R. 1).

After answer by the Government (R. 5-6), both parties moved for summary judgment (R. 11, 29). In denying petitioner's motion and granting that of the Government, the Court of Claims held that 28 U. S. C. 541(c) (*supra*, p. 2), "neither * * * by * * * [its] words * * * nor its legislative history" indicates "that a marshal cannot be removed by the President before the expiration of his four-year term" (Pet. App. 9). Relying on *Parsons* v. *United States*, 167 U. S. 324, the court ruled that "It is settled that the President can remove an executive officer before the expiration of the statutory term of office" (Pet. App. 10), and concluded (Pet. App. 10) that "it is clear that a United States marshal is an executive officer whose duties are ministerial and purely executive" and consequently removable from office "at the pleasure of the President prior to the expiration of the statutory term of office. *Myers* v. *United States*, 272 U. S. 52; *Humphrey's Executor* v. *United States*, 295 U. S. 602; *Morgan* v. *Tennessee Valley Authority, et al.*, 115 F. 2d 990, cert. den. 312 U. S. 701."

ARGUMENT

Petitioner, apparently recognizing that the President has unlimited power to remove purely executive officials without regard to a Congressional prescription of a term of office (see *Myers* v. *United States*, 272 U. S. 52; *Parsons* v. *United States*, 167 U. S. 324), claims that as United States Marshal for the Eastern District of Pennsylvania he was a judicial rather than an executive official within the limited exception from the President's removal power set out in *Humphrey's Executor* v. *United States*, 295 U. S. 602. Based on this and his further contention that 28 U.S.C. 541(c) (*supra*, p. 2), was intended to limit the President's removal power, petitioner concludes that his removal was invalid.

Both of these contentions were presented to and rejected by the Court of Claims. That court held first that as a United States Marshal petitioner exercised purely executive or ministerial functions, so that *Myers*, rather than *Humphrey*, controlled. Second, the court ruled that 28 U.S.C. 541(c), particularly when read in the light of the history since 1789, did not limit the President's removal power. Since each ground is correct and either one alone is sufficient to support the judgment below, further review by this Court is unwarranted.

1. The duties and functions of United States Marshals are completely different from those of the Federal Trade Commissioner involved in *Humphrey*, who, as this Court pointed out, was intended to be "independent of executive authority, * * * and free to exercise [his] judgment without the leave or hindrance of any other official or any department of the government"

(295 U. S. at 625-626). A United States Marshal is not a "judicial" officer, nor does he participate in the judicial function in so far as interpreting the law, or deciding disputes, cases, or controversies between adversaries is concerned. With respect to the trial of a case he is simply a police officer charged with the duty of maintaining order in the courtroom, of protecting the jury from interference, and of handling prisoners. He has nothing whatsoever to do with considering, weighing, and making the decision or judgment. After the judgment by the court is made, it is the Clerk's duty to enter and record. With respect to writs, subpoenas, and other court papers, the Marshal's duties and functions are purely ministerial, *i.e.*, to serve them and make returns. 28 U.S.C. 547.

The United States Marshal is not a creature of the court, such as the Clerk may be said to be. He is not even a court employee. The federal agency employing him is the Department of Justice, through which his salary and fees are paid, and by which his duties and functions are defined.[1] The descriptive list of his duties contained in petitioner's own affidavit (R. 20-23) makes clear that the Marshal's function is strictly non-judicial and wholly of an executive nature, *i.e.*, to attend, when required, the District Court and the Court of Appeals in session in his district, and to execute writs, process, and orders. By statute, the Attorney General is charged with the duty of supervising and directing the Marshal's performance of his duties and the accounting for his public monies. 28 U.S.C. 547. Similarly, the Marshal is required to report his official proceedings,

[1] The Department issues a "United States Marshals Manual" which sets out in detail the Marshal's duties and powers.

receipts and disbursements, and the condition of his office to the Attorney General. See also 28 U.S.C. 541, 542, 544, 550. Since he is thus accountable to, and under the supervision and direction of, the Department of Justice, it is clear that the Marshal's duties are so executive in nature as to preclude him from falling within the *Humphrey* exception.

This Court long ago pronounced United States Marshals to be executive officers of the Government. *In re Neagle*, 135 U.S. 1, the Court stated (135 U.S. at 63):

> The ministerial officers through whom its commands must be executed are marshals of the United States, *and belong emphatically to the executive department of the government*. They are appointed by the President, with the advice and consent of the Senate. *They are removable from office at his pleasure*. They are subjected by act of Congress to the supervision and control of the Department of Justice, in the hands of one of the cabinet officers of the President, and their compensation is provided by acts of Congress. The same may be said of the district attorneys of the United States, who prosecute and defend the claims of the government in the courts. [Emphasis added.]

See also *Ex Parte Siebold*, 100 U. S. 371; 39 Op. A. G. 115.[2]

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[2] *Cammer* v. *United States*, 350 U.S. 399, 405, relied on by petitioner (Pet. 4), is irrelevant. It involved an attorney, not a United States Marshal. Moreover, the issue there concerned the scope of a court's power summarily to punish for contempt under 18 U.S.C. 401(2)—a wholly different problem.

2. Equally sound is the Court of Claims' reading of 28 U.S.C. 541(c). In this connection, petitioner contrasts 28 U.S.C. 541(c) with its predecessor contained in the Act of June 30, 1926, 44 Stat. 916, 28 U.S.C. 491 (1940 ed.)[5] — which differs slightly in grammatical construction and the position of the phrase "unless sooner removed by the President" — and he concludes (Pet. 6):

> By this statute [28 U.S.C. 541(c)], Congress has provided that the power of the President to remove does not arise until the marshal's term has expired. This is as effective a limitation as if causes for removal were specified. It makes the four year term definite and certain subject only to the impeachment power of the Congress.

Since the early days of this Nation, the President has been free to remove a United States Marshal and the Reviser's Note to 28 U.S.C. 541(c) does not disclose any intention by the slight recasting of the language to depart from the prevailing law, let alone to affect the drastic change asserted by petitioner. In addition to noting changes in phraseology, the Reviser's Note merely comments on the omission as "unnecessary" of a provision

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[5] The Act of June 30, 1926, 44 Stat. 1, was the 1926 compilation of the United States Code. Section 2 of which provided that the Code was "prima facie the laws of the United States." 28 U.S.C. 491 was derived from Section 1 of the Act of June 24, 1898, 30 Stat. 487, which had provided:

> * * * the attorneys and marshals of the United States * * * shall continue to discharge the duties of their respective offices, unless sooner removed by the President, until their successors shall be appointed and qualify in their stead. But they shall be appointed and commissioned for the term of four years as now provided by law.

relating to the removal of a Marshal in certain circumstances.[4]

Section 27 of the Act of September 24, 1789 (1 Stat. 87), expressly provided that "* * * a marshal shall be appointed in and for each district for the term of four years, but shall be removable from office at pleasure." Subsequently, in the Revised Statutes of 1873 and 1878, this provision was revised in Section 779 to provide simply that "Marshals shall be appointed for a term of four years."

The statutes as to United States Attorneys had followed a similar course. See 1 Stat. 92, 3 Stat. 582, Rev. Stat. 769. At a time when the operative statute was Rev. Stat. 769 which, like Rev. Stat. 779, provided only "for a term of four years," the President removed a United States Attorney, one Parsons, prior to the expiration of his term. Claiming, as petitioner does here, that the statute gave him a legal right to hold office for four years and that the inclusion of a specific right to remove, in a predecessor statute, indicated that the President had no right to remove in the absence of a specific grant, Parsons sought to recover his salary for the unexpired portion of his term. On appeal, this Court rejected these arguments (*Parsons* v. *United States*, 167 U. S. 324, 339):

> The provision for a removal from office at pleasure was not necessary for the exercise of that power by the President, because of the fact that he was then regarded as being clothed with such power in

---

[4] The Reviser's Notes are authoritative as to the meaning of the 1948 codification of 28 U.S.C. *Western P. R. Corp.* v. *Western P. R. Co.*, 345 U.S. 247; *United States* v. *National City Lines*, 337 U.S. 78; see also *Ex parte Collett*, 337 U.S. 55, 71.

any event. Considering the construction of the Constitution in this regard as given by the Congress of 1789, and having in mind the constant and uniform practice of the Government in harmony with such construction, we must construe this act as providing absolutely for the expiration of the term of office at the end of four years, and not as giving a term that shall last, at all events, for that time, and we think the provision that the officials were removable from office at pleasure was but a recognition of the construction thus almost universally adhered to and acquiesced in as to the power of the President to remove.[5]

In 1898, a year after the *Parsons* decision, Congress again reformulated the provisions relating to Marshals as well as to United States Attorneys. See *supra*, p. 7, fn. 3. The purpose of the new provisions, that those officials were to remain in office until their successors have been appointed and qualified, is explained in the Report of the House Committee (H. Rep. No. 1317, 55th Cong., 2d Sess., p. 1):

> In practice it frequently occurs that the term of a district attorney or marshal expires during the active progress of a term of court, when the services of a district attorney and marshal are required every day; and as neither the district attorney nor marshal is authorized to act as such after the expiration of the four-year term for which he is commissioned, the happening of such a vacancy causes an interruption of the business of the court and

[5] The *Myers* case expressly reaffirmed *Parsons*, after a further elaborate review of the extensive materials.

> often works great harm and expense to the Government as well as to litigants. * * *
>
> The purpose of this bill is not to change the four-year term for which these officers are appointed, but to permit them to discharge their respective duties until their successors shall be appointed and qualified, unless sooner removed by the President, thus preventing the necessity for an interruption of the business of courts on the expiration of the four-year terms of these officers.

This long-established practice as well as the history of the statute, coupled with the absence of any indication of a material change in 1948, clearly justifies the holding of the Court of Claims that under 28 U.S.C. 541(c) the President continued, as in the past, to have authority to remove petitioner prior to the expiration of his four-year term.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
MELVIN RICHTER,
JOSEPH LANGBART,
Attorneys.

SEPTEMBER, 1956.

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